156-518

RECORD, CASE No. 14,372.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., ~~324~~ 55

CATHERINE GOLDEY, PLAINTIFF IN ERROR,

vs.

THE MORNING NEWS OF NEW HAVEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 22, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 27, 1893.

1 At a special term of the supreme court of the State of New York, held in and for the county of Kings, at the court-house, in the city of Brooklyn, on the 24th day of January, 1890.

Present: Hon. Edgar M. Cullen, justice.

CATHERINE GOLDEY, Plaintiff,
against
THE MORNING NEWS OF NEW HAVEN, Defendant.

A petition having been duly made and filed in this suit by the defendant, The Morning News Company of New Haven, appearing herein specially and for the sole and single purpose of presenting its petition to this court for the removal of this suit to the circuit court of the United States for the eastern district of New York, said petition being filed on the 24th day of January, 1890, and said petitioner having duly made and filed therewith a bond, with good and sufficient surety, for the entering in such circuit court on the first day of its next session a copy of the record in this suit and for paying all costs which may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and for doing such other and appropriate acts as required, pursuant to the statutes of the United States in such case made and provided:

2 Now, on motion of Henry B. B. Stapler, attorney for said petitioner, who appears herein specially and for the sole and single purpose of presenting said petition to this honorable court for the removal of the above-entitled suit to the circuit court of the United States for the eastern district of New York, it is—

Ordered and judged that it is made to appear to the satisfaction of this court that the above-entitled action is a suit of a civil nature now pending in this court; that the only controversy in the said suit is wholly between citizens of different States; that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Connecticut; that the plaintiff was at the time of the commencement of this suit and still is a citizen of the State of New York; that the value of matter in dispute exceeds two thousand dollars, exclusive of interest and costs, and that in the said suit the only controversy is between the said plaintiff, on the one side, and the defendant, the petitioner, on the other.

And it is further ordered and adjudged that this court doth accept the said petition and bond so made and filed as aforesaid, and that the suit be removed for trial into the next circuit court of the United States to be held in and for the eastern district of New York, and that this court proceed no further therein, and that all proceedings in this court in the said cause be, and the same are hereby, stayed.

Granted January 24, 1890.

WM. J. KAISER, *Clerk.*

Enter: E. M. C.

3 New York Supreme Court, County of Kings.

CATHERINE GOLDEY, Plaintiff,
against
THE MORNING NEWS OF NEW HAVEN, Defendant.

To the supreme court of the State of New York:

The petition of the Morning News Co. of New Haven, appearing herein specially and for the sole and single purpose of presenting this its petition to this honorable court for the removal of the above-entitled cause to the circuit court of the United States for the eastern district of New York, respectfully shows to this court—

I. That your petitioner is the defendant above named, and that the time within which the said defendant is required by the laws of the State of New York to answer or plead to the complaint herein has not yet expired.

II. That the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

III. That the only controversy in said action is between citizens of different States.

IV. That your petitioner was, at the time of the commencement of this action, and still is, a corporation organized and existing under and by virtue of the laws of the State of Connecticut and a citizen of said State.

4 V. That, as your petitioner is informed and believes, the plaintiff was, at the time of the commencement of this action, and still is, a citizen of the State of New York.

VI. That in said action the only controversy is between the said plaintiff, on the one side, and the defendant, your petitioner, on the other, as will more fully and at large appear by the complaint, a copy of which is filed herewith.

Your petitioner further shows that the only parties to the said action are said Catherine Goldey, named as plaintiff in said action, and the said The Morning News of New Haven, named as defendant in said action.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in the circuit court of the United States on or before the first day of its next session a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court if said court shall hold that such action was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said bond and to cause the record herein to be removed to the said circuit court of the United States in and for the southern district of New York.

And your petitioner will ever pray, &c., &c.
Dated Jan. 23rd, 1890.

(S'g'd) THE MORNING NEWS CO. OF NEW HAVEN (CONN.).
By HENRY W. FARNAM, *President.*

HENRY B. B. STAPLER.
Attorney for Petitioner, Appearing Specially and for the Sole and Single Purpose of Presenting the Above Petition to the said Court for the Removal of the Above-entitled Suit to the U. S. Circuit Court for the Eastern District of New York.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Henry W. Farnam, being duly sworn, says that he is the president and as such the chief executive officer of the corporation, the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(S'g'd) HENRY W. FARNAM.

Sworn to before me this 23rd day of January, 1890.
[NOTARIAL SEAL.] (S'g'd) G. L. STERLING,
Notary Public, New York County.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Edward F. Reilly, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that G. L. Sterling, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe. In testimony whereof I have hereunto set my
6 hand and affixed the seal of the said court and county this 24th day of Jan'y, 1890.

[SEAL.] EDWARD F. REILLY, *Clerk.*

Know all men by these presents that we, The Morning News Co. of New Haven, as principal, and Samuel L. Morrison and Frank Jenkins, as sureties, are held and firmly bound unto the plaintiff, Catherine Goldey, and all other persons whom it may concern, in the penal sum of one thousand dollars ($1,000.00); — which payment we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—yet upon these conditions:

The defendant, The Morning News of New Haven, having

petitioned the supreme court of the State of New York in the county of Kings for the removal of a certain cause therein pending, wherein the said Catherine Goldey is plaintiff and the said The Morning News of New Haven is defendant, to the circuit court of the United States for the eastern district of New York:

Now, if the said The Morning News of New Haven, the petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in the said action, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said circuit court shall hold
7 that said suit was wrongfully and improperly removed thereto, and shall do or cause to be done such other and appropriate acts as are required pursuant to the statute of the United States in such case made and provided, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hand and seal this 23rd day of January, 1890.

THE MORNING NEWS CO. OF NEW HAVEN (CONN.), [SEAL.]
By HENRY W. FARNAM, *President.*
SAMUEL L. MORRISON. [SEAL.]
FRANK JENKINS. [SEAL.]

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the 23rd day of January, 1890, before me personally appeared Samuel L. Morrison, Frank Jenkins, and Henry W. Farnam, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same; and the said Henry W. Farnam acknowledged to me that he executed the said instrument as president of the *the* said Morning News Co. of New Haven, and that he was duly authorized to execute the said bond as principal as and for the act and deed of the said New Haven News Co. of New Haven.

[NOTARIAL SEAL.] G. L. STERLING,
Notary Public, New York County.

8 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Samuel L. Morrison, being duly sworn, says that he is surety above named; that he resides at No. 3 Washington square, in the city of New York, and is a householder in the State of New York and worth the sum of one thousand dollars over all the debts or liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

SAMUEL L. MORRISON.

Sworn to before me this 23rd day of January, 1890.

G. L. STERLING,
Notary Public, New York County.

STATE OF NEW YORK, }
City and County of New York, } ss:

Frank Jenkins, being duly sworn, says that he is a surety above named; that he resides at 97 Lexington Ave., New York city, and is a householder in the State of New York and worth the sum of one thousand dollars over all the debts or liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

FRANK JENKINS.

Sworn to before me this 23rd day of January, 1890.

G. L. STERLING,
Notary Public, New York County.

9 STATE OF NEW YORK, }
City and County of New York, } ss:

I, Edward F. Reilly, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record do hereby certify that G. L. Sterling, before whom the annexed deposition and acknowledgement was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 24th day of Jan'y, 1890.

[L. S.] EDWARD F. REILY, *Clerk.*

The Supreme Court of New York.

CATHERINE GOLDEY
against
THE MORNING NEWS OF NEW HAVEN.

The complaint of the plaintiff respectfully shows:

I. That the defendant is a foreign corporation duly organized under the laws of the State of Connecticut and is engaged in
10 the publishing of a newspaper at New Haven, in the State of Connecticut, under the name and style of "The Morning News."

II. That said newspaper has a large circulation in said State of Connecticut and in the State of New York and other States of the United States.

III. That this plaintiff at the times hereinafter mentioned was a resident of the city of Brooklyn, in the State of New York, and previous to the publication of the libel hereinafter complained of had enjoyed a good reputation and was respected in the community by all who knew her or her reputation.

IV. That on or about the 4th day of January, 1889, the defendant, for its reward and benefit and to injure this plaintiff, wilfully and maliciously published on the first page of its said paper the following false and defamatory article, to wit:

Mrs. Goldey's scheme.

Lucre and not love was at the bottom of it.

She seems to have made a practice of trading in unfortunate children—The Rev. Mr. Lathbury is without blame in the matter.

"The Rev. Albert A. Lathbury, of the Summerfield Methodist church, of this city, has been made the victim of false and malicious charges. These charges were made public by a Mr. Fisher, of Middletown, an ex-Methodist preacher, at the instigation of Mrs. Catherine Goldey, of Brooklyn, N. Y. Mrs. Goldey's claim is that Mr. Lathbury has gained possession of her daughter in an illegal
11 manner, and, having refused to give her up, Mrs. Goldey proposed to have the matter investigated by the presiding elder, the Rev. J. W. Beach, of Middletown."

Par. 2. "The Rev. Mr. Lathbury was seen yesterday evening. He said that no charge had been preferred against him by his presiding elder, and that no intention of making such charges had been made known to him, except through the press."

Par. 3. "Assistant City Attorney Dow, who is guardian of the little girl, told a Morning News reporter the whole story yesterday evening. The facts entirely exonerate Mr. Lathbury and throw a shadow upon the character of Mrs. Goldey. The story is as follows:"

Par. 4. "Several years ago, when the Rev. Mr. Lathbury was pastor of a Methodist church in Brooklyn, Mrs. Goldey came to him and asked him to adopt a little girl whom she had in her possession. She stated that the child was a foundling; that the parents were unknown to her, but that she had obtained it from a family in Bloomfield, N. J., with whom it had been left. This family, it has transpired, knew the mother of the girl and had been paid for the clothing which it wore."

Par. 5. "About the time that Mrs. Goldey proposed that Mr. Lathbury and his wife adopt the child the clergyman was assigned to his present pastorate and came here to live. Mrs. Goldey wrote many letters to him and came to see him several times about the adoption of the little girl. Mr. Lathbury finally told her that if she was willing for him to adopt the child she might bring the little one to New
Haven. He then went to Mr. Dow and consulted him as to
12 the necessary legal proceedings. There seemed to be no one who had a legal claim to the child, and Judge Robertson appointed Mr. Dow her guardian in order that the adoption might be made legal. Before doing this Judge Robertson investigated the case thoroughly and was perfectly satisfied with what was done and what it was *proposed* to do."

Par. 6. "After Mr. Dow had been appointed guardian Mrs. Goldey

came to him and demanded the return of the child. She teased, begged, and threatened the attorney, but made no pretense of a legal claim to the child. She was told that when any one could show a legal claim to the girl prior to her guardians she would be given up, but not until then."

Par. 7. "Mrs. Goldey kept up a constant bombardment for two months, and used every means to secure the child. She threatens to make the case public, to prefer charges against Mr. Lathbury and Mr. Dow, to publish the name of the mother, and by many other vain threats attempted to bulldoze the legal guardians of the child. After using all her own plans she enlisted the Rev. Mr. Fisher in her case, and that gentleman came to New Haven and used the same kinds of means to accomplish the end. He met with a cool reception."

Par. 8. "Then the mother appeared upon the scene. Her first visit was unknown to any of the parties interested, but on her second visit she called upon Mrs. Lathbury. She told her story and how it happened that the child had been homeless. She did not want the custody of the child herself, but was only anxious that it should not fall into Mrs. Goldey's hands again. She stated that if she was obliged to take possession of the child she would
13 return it at once to Mrs. Lathbury."

Par. 9. "The mother also went to Mr. Dow, and with him visited the probate office, where of her own will she signed the papers necessary to convey the child to Mr. and Mrs. Lathbury. She made her statement to Judge Robertson voluntarily, and said that she was a poor woman and unable to support her child."

Par. 10. "Mrs. Goldey has told Mr. Dow that she had possession of several other children which she had disposed of for $100 each. She also said that if Mr. Lathbury had gone about in the right way he might have adopted the little girl without any trouble. The girl is a very pretty little creature, and Mrs. Goldey undoubtedly had a mercenary object in view. This is probably the 'proper way' in which she wished Mr. Lathbury to adopt the child."

Par. 11. "Unable to obtain any satisfaction in other directions, she hunted down the mother and by means of threats tried to get her into her power. She was again foiled by the motherly affection of the parent, who has now placed her child in kind and tender hands. The little one has secured a home, and will undoubtedly outlive the unpleasant circumstances connected with her childhood."

Par. 12. "Mrs. Goldey has visited nearly every attorney in New Haven, but could get no one to take up her cause."

V. That said article was false and untrue, and the defendants knew it to be false and untrue; that its language, insinuations, innuendoes, and charges held plaintiff up to public ridicule, contempt, and disgrace, and was maliciously written for that purpose.

14 VI. That by the language and insinuations contained in paragraph 10 of said article, as set forth in this complaint, this plaintiff was accused of a crime, to wit, the crime of kidnapping,

enticement, and abduction of children for the purpose of selling their persons or services for money.

VII. That by reason of the premises and the malicious and unlawful acts of the defendant this plaintiff has been injured in her reputation and character, has been made sick in body and mind, and caused to suffer mentally and physically beyond expression, to her damage one hundred thousand dollars.

Wherefore she demands judgment against the defendant in the sum of one hundred thousand dollars, besides the costs of this action.

M. L. TOWNS,
Pltf's Att'y.

Office and P. O. address, 16 Court street, Brooklyn, N. Y.

CITY OF BROOKLYN, } ss:
County of Kings, }

Catherine Goldey, the plaintiff herein, being duly sworn, says that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge except as to the matters therein stated to be *on* alleged on information and belief, and as to those matters she believes it to be true.

CATHERINE GOLDEY.

15 STATE OF NEW YORK, } ss:
County of Kings, }

I, William J. Kaiser, clerk of the county of Kings and clerk of the supreme court of the State of New York, in and for said county (said court being a court of record), do hereby certify [L. S.] that I have compared the annexed with the original complaint, petition, bond, and order removing cause to the U. S. circuit court, filed in my office, and that the same are true transcripts thereof and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 24th day of January, 1890.

WM. J. KAISER, *Clerk.*

Endorsed: Copy of order, petition and bond on application for removal. Filed February 5, 1890.

16 Circuit Court of the United States for the Eastern District of New York.

CATHERINE GOLDEY, Plaintiff, }
against }
THE MORNING NEWS OF NEW HAVEN, Defendant. }

On reading the annexed affidavit of Henry B. B. Stapler, an attorney and counsellor of this court, who has appeared specially herein for the purpose of applying to this court for an order setting aside the summons in this action and the service thereof on the de-

fendant, alleged to have been made as specified in the affidavit hereto annexed, and on the said summons and complaint and petition for removal, and upon reading the affidavit, hereto annexed, of the said Henry W. Farnam, president of the defendant, and upon all the proceedings herein, it is—

Ordered that the said Catherine Goldey, or her attorney, show cause before this court, at the United States court-house, at the city of Brooklyn, on Friday, the 7th day of February, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said summons and the service thereof should not be set aside and declared null and void.

And it is further ordered that the defendant's time to enter a general appearance in the above action in this court and to answer or demur or plead to the complaint herein be extended for a
17 period of ten days after the hearing and determination of the said application to set aside the summons in this action and the service thereof herein as aforesaid.

And it is further ordered that the service of a copy of this order to show cause on the said plaintiff or her attorney on or before the 7th instant be deemed sufficient service thereof.

CHARLES L. BENEDICT.

Brooklyn, New York, February 5, 1890, one o'clock p. m.

Circuit Court of the United States for the Eastern District of New York.

CATHERINE GOLDEY, Plaintiff,
against
THE MORNING NEWS OF NEW HAVEN, Defendant.

EASTERN DISTRICT OF NEW YORK, *ss.:*

Henry B. B. Stapler, being duly sworn, says that he is an attorney and counsellor at law of the supreme court of the State of New York and duly admitted to practice in this court; that he has been retained by the defendant in the above-entitled matter.

Deponent further shows upon information and belief that on the 4th day of January, 1890, a copy of certain papers purport-
18 ing to be a summons and complaint in an action in the supreme court of the State of New York, wherein Catherine Goldey, above named, was named as plaintiff and The Morning News Co. of New Haven was named as defendant, *were* handed to Henry W. Farnam, the president of said Morning News Company of New Haven, while he, the said Henry W. Farnam, was temporarily within the State of New York; that the said Morning News Company of New Haven, named as defendant herein, is a corporation organized under the laws of the State of Connecticut and carries on its business of publishing its paper every week day in the city of New Haven, in the State of Connecticut; that the said company is not engaged in business in the State of New York, and has no place of business within the State of New York, nor any office

for the transaction of such business in the State of New York, nor does any agent of the said company reside in the State of New York, nor did such company have any place of business nor has it engaged in business nor had any agency in the State of New York at any time mentioned in this affidavit or at any time previous thereto; that the said Henry W. Farnam, president of the said company, resides in the city of New Haven, in the State of Connecticut, where he is continuously engaged in discharging his duties as a member of the faculty of Yale university, and that none of the officers or directors of said defendant resides in the State of New York.

That on the 24th day of January, 1890, the said defendant, by this deponent, appearing specially as its attorney for the sole purpose of having the said cause removed to the United States circuit court for the eastern district of New York under the provis-
19 ions of the acts of Congress of the United States in such case made and provided, duly presented its petition to the said supreme court of the State of New York, in the county of Kings, for the purpose aforesaid, a copy of which petition is hereto annexed, and at the same time duly presented the requisite bond, with sufficient surety; that thereupon an order was duly entered in the clerk's office of the said supreme court, in the county of Kings, in which it was provided that the said supreme court should proceed no further in said action; and deponent further shows that, upon the filing of said petition and the said bond and the acceptance thereof by the said court, the said cause was removed into the United States circuit court for the eastern district of New York; that the said defendant did not appear generally in the said supreme court in said action alleged to have been commenced in said supreme court, but appeared specially and for the sole and single purpose of presenting its said petition to the said supreme court, as will more fully appear by reference to said petition, a copy of which is hereto annexed.

That said petition and bond were so presented by this deponent as aforesaid at a quarter to twelve o'clock on the said 24th day of January, 1890.

Deponent further shows that a certified copy of the record of said action alleged to have been commenced in the said supreme court was duly filed in this court on the 5th day of February, 1890, and that the said defendant, The Morning News Company of New Haven, has, by this deponent, entered a special appearance in this court for the purpose of applying to this court for an order setting aside the said summons and the service thereof made as aforesaid upon
20 the said Henry W. Farnam, president of the said defendant, on the ground that the law is, in the opinion of this deponent, that the said defendant, being a corporation organized under the laws of the State of Connecticut, where it solely carries on its business, and transacting no business within the State of New York nor having any agent clothed with authority to represent it in the State of New York, cannot be legally be made a defendant in an action by a service upon one of its officers while temporarily in said State of New York.

That the said deponent, on the behalf of the said defendant, de-

sires to present this contention to the consideration of this court, and to this end asks that an order may be made by this court directing the said plaintiff or her attorney to show cause before this court at an early day why the summons in this action and the service thereof should not be set aside as illegal and void.

And deponent further asks that the time for the defendant to enter a general appearance in this action and to answer or demur or plead to the complaint herein in this court be extended for the period of ten days after the decision on the said application by the defendant to set aside the summons and the service thereof herein as aforesaid.

HENRY B. B. STAPLER.

Sworn to before me this 5th day of February, 1890.

WM. H. COCHRAN,
[L. S.] *Notary Public, Kings Co., N. Y.*

21 Circuit Court of the United States for the Eastern District of New York.

CATHERINE GOLDEY, Plaintiff,
against
THE MORNING NEWS OF NEW HAVEN, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

Henry W. Farnam, being duly sworn, says that he is the president of the defendant, The Morning News Company of New Haven; that the said defendant is a corporation organized under the laws of the State of Connecticut, and carries on its business of publishing a paper every week day in the city of New Haven, in the State of Connecticut; that said defendant is not engaged in business in the State of New York; that the said defendant has no place of business within the State of New York nor any office for the transaction of such business in the State of New York, nor does any agent of said defendant reside within the State of New York, nor did such defendant have such place of business or has it engaged in business in the State of New York at any time mentioned in this affidavit or at any time previous thereto.

That deponent resides in the city of New Haven, in the State of Connecticut, where he is continuously engaged in discharging his duties as a member of the faculty of Yale university. Deponent further says that none of the officers or directors of said defendant reside in the State of New York.

22 That deponent, while temporarily within the city of New York on the 4th day of January, 1890, was handed certain papers, alleged to be a summons and complaint, entitled "Catherine Goldey, plaintiff, against The Morning News of New Haven, defendant," a copy of which papers *are* hereto annexed.

HENRY W. FARNAM.

Sworn to before me this 3rd day of February, 1890.

G. L. STERLING,
[L. S.] *Notary Public, N. Y. Co.*

Endorsed: Order to show cause and affidavits. Filed April 1, 1890.

23 At a stated term of the United States circuit court for the eastern district of New York, held at the United States court-house, in the city of Brooklyn, on the 11th day of April, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

CATHERINE GOLDEY, Plaintiff,
against
THE MORNING NEWS OF NEW HAVEN, Defendant.

On reading and filing the order granted herein on the 5th day of February, 1890, directing the plaintiff to show cause why the service of the summons in the above-entitled matter on Henry W. Farnam, president of defendant, while temporarily within the State of New York should not be set aside, and on reading and filing the certified copy of the complaint herein and the affidavit of Henry W. Farnam, president of defendant, showing that the defendant is a corporation organized under the laws of the State of Connecticut and doing business in that State; that the said defendant does not carry on business within the State of New York and has no place of business therein and no agent residing therein, and on reading and filing a certified copy of the petition of the defendant for the removal of the said cause to this court from the State court, and on reading and filing the affidavit of Henry B. B. Stapler, Esq., specially
24 appearing as the attorney for the defendant herein, showing the special appearance of the defendant both in the State court and in this court, and after hearing Henry B. B. Stapler, Esq., counsel for the defendant, in support of the motion to set aside the service of the summons herein, and Mirabeau L. Towns, Esq., counsel for the plaintiff, in opposition thereto, and due consideration being given thereto—

It is ordered that the service of the summons herein be, and the same is hereby, set aside and the same declared to be null and void and of no effect, and the defendant is hereby relieved from appearing to plead in answer to the complaint or otherwise herein.

E. HENRY LACOMBE.

Endorsed: Order setting aside the service of the summons. Filed April 11, 1890.

25 Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

CATHERINE GOLDEY
vs.
THE MORNING NEWS OF NEW HAVEN. } Bond for Damages and Costs.

Know all men by these presents that we, Catherine Goldey and Charles P. Goldey, are held and firmly bound unto the above-named The Morning News of New Haven in the sum of two hundred and fifty dollars, to be paid to the said defendant; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eleventh day of September, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named Catherine Goldey hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Catherine Goldey shall prosecute her writ of error to effect and answer all damages and costs if she fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

26 CATHERINE GOLDEY. [L. S.]
CHARLES P. GOLDEY. [L. S.]

Sealed and delivered and taken and acknowledged this 11th day of Sept., 1890, before me—

F. B. DOWNING,
Notary Public, Kings Co.

UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

Charles P. Goldey, being duly sworn, doth depose and say that he resides in the city of Brooklyn, New York State; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

CHARLES P. GOLDEY.

Sworn to this 11th day of Sept., A. D. 1890, before me—
[L. S.] F. B. DOWNING,
Notary Public, Kings Co.

Approved as to form, manner of execution, and sufficiency of sureties.

Dated Sept. 24, 1890.

E. HENRY LACOMBE.

Endorsed: Bond for costs. Filed Sept. 26, 1890.

27 EASTERN DISTRICT OF NEW YORK, *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, do hereby certify that the foregoing pages, numbered from one to twenty-six (B. L. B.), inclusive, contain a true and complete transcript of the record of proceedings had in said court in the case of Catherine Goldey, plaintiff, against The Morning News of New Haven, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said circuit court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this eighteenth day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT, *Clerk.*

28 U. S. Circuit Court, Eastern District of New York.

CATHERINE GOLDEY)
against
THE MORNING NEWS OF NEW HAVEN.)

Plaintiff is a resident of the eastern district of New York; defendant is a Connecticut corporation. The action is for libel, the alleged libellous article having been published in defendant's newspaper. The defendant does not do business here, nor has it either office, agent, or property within this State. Summons and complaint entitled in the supreme court in the county of Kings were served upon Henry W. Farnam, the president of defendant, while temporarily within the State of New York. Defendant appeared and filed petition of removal, and now moves to set aside service of the summons. The appearances, both in the State court and here, were special and expressed to be for the sole purpose of raising the objection now advanced.

For the plaintiff, M. L. Towns, Esq.

For the defendant, H. B. B. Stapler, Esq.

LACOMBE, *Circuit Judge:*

It has been held in this circuit that service such as this does not confer jurisdiction upon the State court to render a personal judgment against the defendant, and that such judgment (had
29 the case not been removed) would be treated in this court as void.

Good Hope Co. *vs.* Railway Barb-Fencing Co., 22 Fed. Reps. 635.

That decision determines the question raised here. Motion to vacate service of the process is granted.

March 31, 1890.

E. HENRY LACOMBE.

Endorsed: Decision. Filed April 1, 1890.

30 UNITED STATES OF AMERICA, *ss:*

To the Morning News of New Haven, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Catherine Goldey — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated September 26th, 1890.

E. HENRY LACOMBE.

31 [Endorsed:] U. S. Supreme Court. Catherine Goldey, plaintiff in error, against The Morning News of New Haven, defendant in error. Citation. M. L. Towns, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this — day of ——, 188-. ——— ———, attorney for defendant in error.

CITY OF BROOKLYN, } *ss:*
County of Kings, }

Henry J. Staigele, being duly sworn, says that he is above the age of 21 years; that on the 1st day of October, 1890, he served the within citation on Henry B. B. Stapler, the attorney for the defendant in error, at his office, No. 11 Pine street, New York city, by delivering to and leaving with him personally a true copy thereof at said time and place, and he refused to give admission of service thereof.

HENRY J. STAIGELE.

Sworn to before me this 2d day of October, 1890.

PHILIPP SCHUELL,
Comm'r of Deeds, City of Brooklyn.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Catherine Goldey, plaintiff in error, & The Morning News of New Haven, defendant in error, a manifest error hath happened, to the great damage of the said Catherine Goldey, as is said and appears by her complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30 day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and —.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. HENRY LACOMBE.

23 [Endorsed:] Supreme Court of the United States. Catherine Goldey, plaintiff in error, *vs.* The Morning News of New Haven, defendant in error. Writ of error. M. L. Towns, attorney for plaintiff in error, 16 Court St., Brooklyn, N. Y. Due service of a copy of the within writ of error is hereby admitted this — day of ——, 188–. —— ——, attorney for defendant in error.

CITY OF BROOKLYN, *County of Kings*, } ss:

Henry J. Staigele, being duly sworn, says that he is above the age of 21 years; that on the 1st day of October, 1890, he served the within writ of error on Henry B. B. Stapler, the attorney for the defendant in error, at his office, No. 11 Pine street, New York city, by delivering to and leaving with him personally a true copy thereof at said time and place, and he refused to give admission of service thereof.

HENRY J. STAIGELE.

Sworn to before me this 2nd day of October, 1890.
PHILIPP SCHUELL,
Comm'r of Deeds, City of Brooklyn.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from

— to —, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of —— ——, plaintiff in error, against —— ——, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, and of the Independence of the United States the one hundred and —.

—— ——, *Clerk.*

[Endorsed:] U. S. Supreme Court. Catharine Goldey, plaintiff in error, *vs.* The Morning News of New Haven, defendant in error. Record.

Endorsed on cover: Case No. 14,372. E. New York C. C. U. S. No. 324. Catherine Goldey, plaintiff in error, *vs.* The Morning News of New Haven. Filed October 22, 1890.

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55

Office Supreme Court, U. S.
FILED
DEC 4 1894
JAMES H. McKENNEY,
CLERK.

156-516

U. S. SUPREME COURT.

CATHERINE GOLDEY,

Plaintiff in Error,

against

THE MORNING NEWS OF NEW HAVEN,

Defendant in Error.

Brief on behalf of Plaintiff in Error.

M. L. TOWNS,

Attorney for Plaintiff in Error.

HENRY B. B. STAPLER,

Attorney for Defendant in Error.

Supreme Court of the United States.

CATHERINE GOLDEY,
Plaintiff in Error,
against
THE MORNING NEWS OF NEW HAVEN,
Defendant in Error.

Brief on behalf of Plaintiff in Error.

STATEMENT.

This was an action for libel brought by the plaintiff, a resident of the City of Brooklyn, against the defendant, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and the owner and proprietor of a newspaper known as the Morning News of New Haven.

This action was commenced in the Supreme Court of the State of New York, by the personal service of the summons herein upon the President of said corporation in the State of New York on the 4th day of January, 1890.

On the 24th day of January, 1890, the defendant appeared in said action by Henry B. B. Stapler, its attorney, said appearance purporting to be for the sole purpose of applying for the removal of said cause to the United States Circuit Court for the Eastern District of New York, *on the ground that the parties hereto were citizens of different States.*

Accordingly an order was made by the Hon. Edgar M. Cullen, a Judge of said Supreme Court, removing the said cause to the United States Circuit Court for the Eastern District of New York.

After the removal of said cause, and on the 5th day of February, 1890, an order was made by the Hon. Charles L. Benedict, Judge of the Circuit Court to which said cause was removed, requiring the plaintiff to appear and show

cause why the service of the summons should not be set aside, on the ground that the defendant corporation had no place of business within the State, and that the President when served, was simply temporarily within the State, and not here in an official capacity.

This motion came on for argument before Hon. E. Henry Lacombe, one of the Judges of said Circuit Court, at a stated term thereof, and against the opposition of plaintiff, it was adjudged and decreed by him that the service of the summons herein should be set aside; such decree was accordingly entered, and from it plaintiff duly appealed to this Court.

POINT I.

The Court below erred in setting aside the service of the summons, as the case of Good Hope Company against the Railway Barb Fencing Co., 22 Fed. Rep., 645, upon which said Court relied in making its decision, has no application to the case at bar.

There the original process issued out of the United States Circuit Court. The action was originally commenced in that Court, but in the case at bar the action was commenced and the summons therein issued out of the State Court. That the personal service of the summons upon the *President*, conceding the corporation had no place of business within the State of New York, and conceding its said President was only temporarily within said State was a valid and good service there can be no doubt, and a judgment thereon could have been enforced.

> New York Code of Civil Procedure, Section 432.

In the case of Pope and others against Terre Haute Car Manufacturing Company, reported in 87 N. Y. at page 149, the Court says:

"Personal service of the summons upon a foreign corporation may be made by delivering a copy thereof within

the State to the President, Secretary or Treasurer. In order to make such service effectual it is not necessary that the officer served should be here in his *official capacity*, or engaged in the business of the corporation, or that the corporation should have any property within this State, or that the cause of action should have arisen within this State."

It must therefore follow, as plaintiff contended in the Court below, the service of the Summons in the State Court being regular and valid, and in accordance with the provisions of the Statute, the cause could not be removed so as to bring it within some alleged technical rule of practice in the Circuit Court for the purpose of setting it aside.

POINT II.

The cause having been removed from the State Court, upon motion duly made by the defendant, it was clearly error on the part of the Circuit Court to entertain any motion the object of which was to declare that *there was never any action pending.*

In order to support its application for the removal of the *cause* from the State to the United States Circuit Court, it was necessary, and defendant was obliged to show, "*that the action was pending against the defendant,*" and this seems a perfectly logical and just requirement, otherwise there would be *nothing to remove.*

The order of removal is based upon this representation.

The mere fact that the defendant carefully worded its appearance, so that it purported to have been interposed solely for the purposes of that motion, did not change or alter the consequences of the motion, for by it the defendant waived any defect, if any ever existed, in the service of the summons, and the appearance had the effect of a general appearance in the action.

Plaintiff's position is upheld in Farmer vs. N. L. Association, a recent New York case reported in 138 N. Y., at p. 271; there this proposition is carefully argued, and numerous United States Circuit Court decisions thereon,

collected and discussed; there citing Judge Curtis in Sales vs. Northwestern Insurance Company, 2 Curtis, C. C., 212, the Court says:

"The defendant comes in, becomes the actor, creates the suit as one properly instituted, removes it to another Court, and enters it there, and then says he was not obliged to appear at all, and the State Court in fact had no suit before it. This I am of the opinion he cannot do. The act of Congress allows defendant to remove *actual and legally pending suits* from the State Courts. If this were not such a suit he should not have brought it here. By bringing it here he voluntarily treats it *as properly commenced and actually pending* in the State Court, and he cannot after it is entered here treat it otherwise."

Upon all of the foregoing considerations it is respectfully submitted that the order appealed from should be reversed, with the costs of the appeal to this plaintiff.

M. L. TOWNS,
Attorney for Plaintiff.

156-578

Office Supreme Court, U. S.
FILED.
DEC 8 1894
JAMES H. McKENNEY,
CLERK

156-578

RECORD, CASE No. 14,372.

Supreme Court of the United States,

OCTOBER TERM, 1893.

TERM No. ~~304~~ 555

CATHERINE GOLDEY,
Plaintiff in Error,

vs.

THE MORNING NEWS OF NEW HAVEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 22, 1890.

BRIEF FOR DEFENDANT IN ERROR.

HENRY B. B. STAPLER,
Counsel for Defendant in Error.

M. B. Brown, Printer and Stationer, 49 & 51 Park Place, N. Y.

CASE NO. 14,372.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

CATHERINE GOLDEY,
Plaintiff in Error,

vs.

THE "MORNING NEWS" OF NEW HAVEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

The plaintiff in error brings here for review an order of the Court below (ff. 23, 24) setting aside the service of the summons herein and declaring the said service to be null and void.

The plaintiff named in this action is Catherine Goldey, a citizen of the State of New York. The defendant named is the "Morning News" Company of New Haven, a corporation organized under the laws of Connecticut, and doing business solely within the State of Connecticut.

A summons and complaint, entitled in the Supreme Court in the County of Kings, was handed to Henry W. Farnam, the president of the defendant, while temporarily within the State of New York, on the 4th of January, 1893. Subsequently the defendant presented its petition (ff. 3-5) to the said New York Supreme Court in the County of Kings, *appearing specially therein, and for the sole and single purpose of presenting its said petition to the said Court*, and filed the bond required by the statute. The cause thereupon was removed to the Court below. On the first day of the February Term of said Court for the Eastern District, a certified copy of the record was filed in the Clerk's office of the U. S. Circuit Court for the Eastern District, whereupon the defendant entered a special appearance stating said appearance to be for the purpose of applying to said Court for an order setting aside the summons and the service thereof (f. 20), and immediately thereafter applied to the said

Court for an order directing the plaintiff to show cause on the following Friday why an order of said Court should not be made setting aside the summons and the service thereof as illegal and void.

The affidavits upon which the said order to show cause was granted show (ff. 18–23) that the defendant, the Morning News Company of New Haven, was a corporation organized under the laws of the State of Connecticut, and doing business solely in the City of New Haven in that State, where it was engaged in the business of publishing a daily newspaper. That the said defendant was not engaged in business in the State of New York, and had no place of business within this State of New York, nor any agent representing it there, nor has it ever had a place of business or carried on business or had any agent representing it there. That on the 4th day of January, 1899, a summons and complaint in an action wherein Catherine Goldey was named as plaintiff, and the said Morning News Company of New Haven was named as defendant, were handed to Henry W. Farnam, president of said defendant, while temporarily within the City of New York. That the said Henry W. Farnam resided in the City of New Haven, Conn., where he was continuously engaged in the discharge of his duties as a member of the Faculty of Yale University. That none of the officers or directors of the defendant reside within the State of New York. That within the time limited by the Removal Act, section 3, chapter 866, U. S. Laws, 1888, correcting the enrollment of an Act approved March 3, 1887, viz.: before the time to plead or demur to the complaint had expired, the defendant presented its petition to the N. Y. Supreme Court, appearing only specially therein for the sole and single purpose of presenting its said petition to said Court and filed the requisite bond. That in compliance with the provisions of the said statute the said defendant caused a certified copy of the record to be filed in the Clerk's office of the Court for the Eastern District, and contemporaneously with such filing entered a special appearance in this Court for the purpose of moving to set aside the summons and the service thereof herein.

It is respectfully submitted that upon these facts the order setting aside the summons and the service thereof in this action was properly made and the action was properly dismissed.

Point I.

THE RULING OF THE COURT BELOW IS NOT REVIEWABLE HERE.

As this case arose prior to the Act of March 3, 1891, its disposition must be governed by the prior law.

Sec. 1011 of the U. S. Revised Statutes provided as follows:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error involving any plea in abatement

other than a plea to the jurisdiction of the Court, or for any error in fact."

Sec. 1011, U. S. R. S., p. 189 (2d edition).

The ruling of the Court below in making the order setting aside the service of the summons and dismissing the action sustained the contention of the defendant in error that the summons or writ should be abated on the ground that it was a foreign corporation not carrying on business in the State of New York, and not therefore liable to suit there instituted by service of the summons upon one of its officers temporarily within the State of New York.

This motion to set aside the service of the summons was, in fact, the presentation of a plea in abatement by the defendant in error on the grounds of personal exemption from suit in that jurisdiction.

Such an objection under the common law practice is the proper subject of a plea in abatement.

Stephen on Pleading, p. 85 (3d Am. Ed.)
1 Chitty on Pleading, 16th Am. Ed., p. 595.

As when the defendant was arrested at a time when he was privileged from arrest.

King *vs.* Coit, 4 Day (Conn.), 129.
Hubbard *vs.* Sanborn, 2 N. H., 468.
Le Grand *vs.* Bedinger, 4 T. B. Monroe (Ky.), 539.

Or that he was served with process in any way while privileged from suits.

Van Alystyne *vs.* Dearborn, 2 Wend., 586.
Halsey *vs.* Stewart, 1 South., 366.

Where a defendant does not reside in the State where the suit is brought, but is served with process there, he may plead the matter in abatement (per Bradley, *J.*).

Searls *vs.* Jacksonville, P. and M. R.R. Co., 2 Woods, 621, 625, 626.

Under the modified practice, however, in many districts the issue as to the sufficiency of the suit or its service may be properly raised as a preliminary question on a motion to set aside the service of the summons instead of by a plea in abatement.

Filli *vs.* Del., L. and W. R. R. Co., 37 Fed. Rep. 65.
Denton *vs.* International Co. of Mexico, 36 Fed. Rep., 1.
Atchinson *vs.* Morris, 11 Fed. Rep., 585.
Clews *vs.* Woodstock Iron Co., 44 Fed. Rep., 31.
Bentlif *vs.* L. and C. Finance Co., 44 Fed. Rep., 667.
Forrest *vs.* Union Pacif. Co., 47 Fed. Rep., 1.
Reifsinder *vs.* Am. Pub Co., 45 Fed. Rep., 433.

But it is to the substance of the issue and not to the form in which it is presented if it is submitted that the statute above referred to relates.

Says Mr. Chief-Justice Waite in Stephens *vs.* Monongahela Bank, 111 U. S. Repts., 198.

"As to the first of these defenses it is sufficient to say that the plea of another action pending is a plea in abatement, Bac. Abr., Abatement M; Com. Dig., Abatement H, 24; 1 Chitty's Pl. 10, Am. Ed. 453; 3 id. 963, note Y; and by section 1911 of the Rev. Stat., which is a re-enactment of a similar provision in the Judiciary Act of September 24, 1789, c. 20, sec. 22, 1 Stat., 84, 85, it is expressly provided that there shall be no reversal in this Court or the Circuit Court for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court. Under this statute, it was held in *Piquignot vs. The Pennsylvania Railroad Company*, 16 How., 104, which came from the same district as this case, that the judgment of the Circuit Court, on precisely such a plea as that contemplated by this affidavit of defense, was 'not subject to our revision on a writ of error.' The defense is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, either as to his right to sue in the Circuit Court of the United States, or as to the merits of the matter in dispute."

Stephens *vs.* Monongahela Bank, 111 U. S., p. 198.

Tested by the rule thus laid down it is submitted that a writ of error does not lie to review here the ruling of the Court below in sustaining the objection of the defendant in error to the validity of the writ in the case at bar. Here, as in the case last cited, the defense interposed is one which merely defeats the present proceeding and does not conclude the plaintiff forever either as to her right to sue in the proper forum, or as to the matters in dispute. She can still bring her action in the Courts of the State of Connecticut, or in the United States Circuit Court for the District of Connecticut, where the cause of action (if any) arose and where the merits of the matter in dispute may be litigated.

The defense interposed by the defendant was not, it is submitted, a plea to the jurisdiction of the Court. Such a plea related to the jurisdiction of the Court over the subject matter of the action.

Says Stephen "*A plea to the jurisdiction is one by which the defendant excepts to the jurisdiction of the Court to entertain the action,*" citing an example of such a plea as follows:

"Plea to the jurisdiction.

In an action of ejectment for lands situate within a county palatine.

In the King's Bench. Term, in the year of the reign of King George the Fourth.

C. D. } And the said C. D., in his proper person, comes and defends
at } the force and injury, and says that the said County of Chester
A. B. } is, and, from time whereof the memory of man is not to the contrary, hath been a county palatine; and there now are and for all time aforesaid have been justices there; and that all and singular pleas for the recovery of manors, messuages, and tenements, lying and being within the said county, have been for all the time aforesaid, and still are, pleaded and pleadable within the said County of Chester, before the justices there for the time being, and not here in the Court of our Lord the King," before the king himself.

Stephen on Pleading, 3d Am. Ed., p. 84.

As therefore the defense interposed by the defendant in error on the motion in the Court below was one in abatement of the writ, and not to the jurisdiction of the Court, it is submitted that the ruling of the Court below is not reviewable here.

Point II.

IF HOWEVER THE WRIT OF ERROR LIES TO THIS COURT, IT IS SUBMITTED THAT THE CASE AT BAR BEING AN ATTEMPT BY A CITIZEN OF ONE STATE TO ASSERT THROUGH PROCEEDINGS AT LAW A CLAIM AGAINST A CITIZEN OF ANOTHER STATE, IS COGNIZABLE IN ALL ITS BRANCHES BY THE JUDICIAL POWER OF THE UNITED STATES.

Says the Constitution: "The Judicial power of the United States shall extend to controversies between citizens of different states."

Article III., sec. 2.

Not to a part of the controversy if is submitted, but to *the whole of the legal controversy.*

Says Chief Justice Marshal, in Cohens *vs.* Virgina, 6 Wheat. 378: "The second section of the Third Article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be of the parties. * * * In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended controversies between two or more states, between a state and citizens of another state and foreign states, citizens or subjects. If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may these parties have *a constitutional right to come into the courts of the Union.*"

Says Blatchford, *J.*, in Barron *vs.* Burnside, 121 U. S., p. 198, quoting with approval, Home Insurance Co. *vs.* Morse, 20 Wall, 445:

"The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal Court upon compliance with the terms of the removal statute."

By the Act of Congress of August 3, 1888, correcting the enrollment of the Act of March 3, 1887, it is enacted in "Sec. 3d," "That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State Court to the Circuit Court of the United States, he may make and file a petition in such suit in such State Court *at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff* for the removal of such suit into the

Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

It shall then be the duty of the State Court to accept said petition and bond, and proceed no further in such suit;

And the said copy being entered as foresaid in said Circuit Court of the United States, *the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court.*

Sec. 3 of chapter 866 U. S. Laws of 1888, correcting the enrollment of an act approved March 3, 1887, Vol. I. Supplement to Revised Statutes of the United States, p. 613.

The record in the case at bar shows that the defendant complied in all particulars with the provisions of the above statute. The cause, it is submitted, was thereupon unfolded within the jurisdiction of the United States Court, to be decided by the exercise of the judicial power of the United States as declared in the Constitution of the United States and the decisions of the Supreme Court of the United States, as though the inception of the cause had been in the Court of the United States, instead of in the State Court.

Point III.

IT IS SUBMITTED THAT IT IS WELL-SETTLED LAW THAT JURISDICTION OVER A CORPORATION ORGANIZED UNDER THE LAWS OF ONE STATE AND SOLELY DOING BUSINESS THERE CAN NOT BE OBTAINED BY SERVICE OF THE SUIT OR SUMMONS UPON AN OFFICER OF SUCH CORPORATION IN A STATE WHERE SUCH CORPORATION IS NOT ENGAGED IN BUSINESS AND HAS NO PLACE OF BUSINESS THEREIN NOR AGENTS CLOTHED WITH AUTHORITY TO REPRESENT IT THERE.

This is the rule laid down by the United States Supreme Court in St. Clair *vs.* Cox, 106 U. S., p. 350, where the question is fully discussed.

In this case the question arose upon the validity of a judgment obtained in Michigan against a foreign corporation upon service upon an agent of the corporation but where it did not appear that the corporation did business in that State.

Says Mr. Justice Field:

"The Courts of the United States only regard judgments of the State Courts establishing personal demands as having validity or as imparting verity where they have been rendered upon personal citation

of the party, or, *what is the same thing, of those empowered to receive process for him*, or upon his voluntary appearance.

In Pennoyer *vs.* Neff, we had occasion to consider at length the manner in which State Courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in Federal Courts, and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the Court. The exceptions related to those cases where proceedings are taken in a State to determine the status of one of its citizens toward a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself.

The doctrine of that case applies in all its force to personal judgment of State Courts against foreign corporations. The Courts rendering them must have acquired jurisdiction over the party by personal service, or voluntary appearance, whether the party be a corporation or a natural person. * * * *

"*We are of the opinion that when service is made within the State upon an agent of a foreign corporation it is essential, in order to support the jurisdiction of the Court, to render a personal judgment, that it should appear somewhere in the record that the corporation was engaged in business in the State.*"

St. Clair *vs.* Cox, 109 U. S., p. 353.

In Pennoyer *vs.* Neff, 95 U. S., page 714, a personal judgment was obtained in Oregon in an action upon a money demand against a non-resident of the State who was served by publication of summons, but upon whom no personal service of process within the State was made, and who did not appear, it was held that no title to property passes by a sale under an execution issued upon such a judgment.

The reasoning of the Court extends beyond the facts of the case, and are far-reaching in their consequences. Their scope is directly applied, as shown above in St. Clair *vs.* Cox, *supra*, to service upon representatives of foreign corporations where such service is made in States where such corporations are not engaged in business.

After an exhaustive examination of the cases showing the invalidity of judgments obtained in the method criticized, says Field, J., 95 U. S., p. 732:

"To the same purport decisions are found in all the State courts. "In several of the cases, the decision has been accompanied with the "observation that a personal judgment thus recovered has no binding "force without the State in which it is rendered implying that in such "State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, "and, consequently, no authority to pass upon his personal rights and "obligations: if the whole proceeding, without service upon him or his "appearance, is *coram non judice* and void: if to hold a defendant "bound by such a judgment is contrary to the first principles of justice "—it is difficult to see how the judgment can legitimately have any "force within the State. The language used can be justified only on

" the ground that there was no mode of directly reviewing such judg-
" ment or impeaching its validity within the State where rendered;
" and that, therefore, it could be called in question only when its
" enforcement was elsewhere attempted. In later cases, this lan-
" guage is repeated with less frequency than formerly, it beginning
" to be considered, as it always ought to have been, that a judgment
" which can be treated in any State of this Union as contrary to the
" first principles of justice, and as an absolute nullity, because rendered
" without any jurisdiction of the tribunal over the party, is not entitled
" to any respect in the State where rendered (Smith *vs.* McCutchen,
" 38 Mo., 415; Darrance *vs.* Preston, 18 Iowa, 396; Hakes *vs.* Shupe,
" 27 Id., 465; Mitchell's Administrator, *vs.* Gray, 18 Ind., 123).

" *Be that as it may, the courts of the United States are not required*
" *to give effect to judgments of this character when any right is claimed*
" *under them. Whilst they are not foreign tribunals in their relations*
" *to the State courts they are tribunals of a* DIFFERENT SOVEREIGNTY, *ex-*
" *ercising a distinct and independent jurisdiction, and are bound to give*
" *to the judgments of the State courts only the same faith and credit*
" *which the courts of another State are bound to give to them.*

" Since the adoption of the Fourteenth Amendment to the Federal
" Constitution, the validity of such judgments may be directly ques-
" tioned, and their enforcement in the State resisted, on the ground
" that proceedings in a court of justice to determine the personal rights
" and obligations of parties over whom that court has no jurisdiction do
" not constitute due process of law. Whatever difficulty may be experi-
" enced in giving to those terms a definition which will embrace every
" permissible exertion of power affecting private rights, and exclude
" such as is forbidden, there can be no doubt of their meaning when
" applied to judicial proceedings. They then mean a course of legal pro-
" ceedings according to those rules and principles which have been estab-
" lished in our systems of jurisprudence for the protection and enforce-
" ment of private rights. To give such proceedings any validity, there
" must be a tribunal competent by its constitution—that is, by the law
" of its creation—to pass upon the subject-matter of the suit; and, if
" that involves merely a determination of the personal liability of the
" defendant, *he must be brought within its jurisdiction by service of*
" *process within the State, or his voluntary appearance.*"

Pennoyer *vs.* Neff, 95 U. S., p. 714.

Says Morawetz on Private Corporations, Chapter VIII., section 523, page 496, (2d ed.): "If a corporation is not engaged in trade, and makes no contracts in a foreign state, justice seems to demand that it should not be subjected to suits in that jurisdiction; and it has been held, therefore, that under these circumstances the agents of a company have no authority to represent it in receiving service of writs, or entering a voluntary appearance. Service of process upon the president or other managing agents of a corporation, while merely casually present in the jurisdiction of another State, does not constitute personal service upon the corporation itself."

And so in Moulin vs. Trenton Insurance Co., 24 N. J. L. R., 222, 234, such service upon an officer of a corporation accidentally within the jurisdiction of another State is characterized *as contrary to natural justice and to the principles of international law.*

And see other cases cited and discussed in Pennoyer v. Neff, 95 U. S., pp. 721, 731.

In Good Hope Co. vs. Railway Barb Fencing Co., 22 Fed. Rep., 635, a case originally commenced in the Circuit Court S. D. of New York, it was held that the service of process upon an officer of a corporation not having a place of business within the district—the officer being temporarily within the district—was invalid, and no jurisdiction of the corporation was thereby obtained.

Says Wallace, *J.*: "The question raised by this motion is whether jurisdiction is acquired in an action brought against a foreign corporation, by the service of process on its president while in this district, although the corporation has no office or place of business within this State, and is not engaged in business here, except that it has made occasionally a purchase of goods by sending an agent here for that purpose. Its president came here to adjust a controversy between it and the plaintiff growing out of such a purchase, and was then served with a summons in this action. Stated in another form the question is whether a foreign corporation is 'found' here, within the meaning of section 739, Rev. St., for the service of process, when its president is temporarily here upon the business of the corporation. Jurisdiction of the person is acquired by the Courts of the United States only when the party sued is an inhabitant of or found within the district where the writ is served; and the laws of the State can neither extend nor restrict the conditions upon which jurisdiction depends.

* * * * * * *

"As it never kept an office here, or carried on any part of its business operations here, or been engaged in any business here, which required it to invoke the comity of the laws of the State, it was not 'found' here for the purpose of being sued. The motion to vacate the service of the process is granted."

Good Hope Co. *vs.* R. Barb Fencing Co., 22 Federal Reporter, 635.

As the Removal Act specifically requires that the action after removal to the United States Circuit Court is to be be treated as if originally commenced there, and as the case at bar if it had been originally commenced in the Court below would upon the like proceedings to those there taken by the defendant in error necessarily have been dismissed, it follows that the order made in the case at bar and brought here by writ of error for review was properly made.

Point IV.

THE CONTENTION THAT BY FILING THE PETITION FOR REMOVAL IN THE STATE COURT THE DEFENDANT IN ERROR WAIVED THE RIGHT TO RAISE THE QUESTION OF JURISDICTION IN THE COURT BELOW IS, IT IS SUBMITTED, ERRONEOUS.

Under the Removal Act the removal must be made before the time to plead expires.

> Sec. 3d of the Act of 1888, correcting, etc., the Act of 1887 (*supra*).

By providing that the cause must be removed before the time to plead expires, it necessitates that the pleading shall take place in the United States Court. Therefore by the very provision of the act itself the right to raise every issue which can be raised in the case is relegated to the forum of the United States Court, and this was clearly the legislative purpose and intent.

Says Mr. Justice Gray, in Martin *vs.* Baltimore and Ohio Railroad, 151 U. S. Reports, 686: "This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas; and all pleas and answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to 'oppose or answer' the declaration or complaint which the defendant is summoned to meet. Stephen on Pleading (1st Am. Ed.), 60, 62, 63, 70, 71, 233; Lawes on Pleading, 36). The Judiciary Act of September 24, 1789, chapter 20, section 12, required a petition for removal of a case from a State court into the Circuit Court of the United States to be filed by the defendant 'at the time of entering his appearance in such State court' (1 Stat. 79). The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statutes. (Pullman Car Co. *vs.* Speck, 113 U. S., 84; Smith *vs.* Lyon, 133 U. S., 315, 320; In re Pennsylvania Co., 137 U. S., 451, 454; Fisk *vs.* Henarie, 142 U. S., 459, 467; Shaw *vs.* Quincy Mining Co., 145 U. S., 444, 449.)

Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defence whatever in that court, so that, if the case should be removed, *the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States.*"

> Martin *vs.* Baltimore and Ohio R. R., 151, U. S. Rep. 686.

The defendant in error filed its petition for the removal of the cause within the time specified in the Removal Act, viz.: before the time expired within which it was required to plead in answer to the complaint of the plaintiff.

It has been seen *supra* that the defense of the defendant in error on the ground of the invalidity of the service of the summons was one which under the common law practice would have been raised as a preliminary issue by a plea in abatement. But this is not the case under the Code practice which has been adopted in the State of New York.

Says Baylies' Code Pleading on this point, "All this has been changed by the Code. That act contemplates but one answer which shall embrace matter in abatement as well as matter in bar, and the defendant may now unite matter in abatement and matter in bar and have both tried and determined at the same time."

Baylies on Code Pleading, pp. 241, 242.

Says DANIELS, *J.*, in Hamburger *vs.* Baker, 35 Hun, 456:

"The summons for the commencement of this action was served upon the defendant at Portsmouth in the State of Virginia. An answer, verified by himself, was served by Robert L. Harrison, who subscribed it as "attorney for defendant." This answer was regarded by the Court as a general appearance in the action rendering the defendant amenable to its jurisdiction. And that ordinarily would be the effect of the service of an answer under section 421 of the Code of Civil Procedure. But it was not in this instance, for by this answer the defendant alleged that he was not at the time of the commencement of the suit, or at the time of serving his answer, a resident of the State of New York, and that he had no property and had not been served with a summons in this State. This answer he had the right to make, for if the facts were as they were alleged, then the Court had no jurisdiction over his person and acquired none by the service of the summons upon him (*Shepard vs. Wright*, decided by this General Term, reported *ante*, page 44). And where that may be the fact, and it does not appear from the complaint itself, it may be relied upon as a defense by way of answer (Code Civ. Pro., § 488, sub. 1; § 498). And the answer could only be made and served by the defendant appearing and making it in person, or by the employment, and through the intervention of an attorney; subscribing such an answer therefore, as this was subscribed, was not such an appearance in the action as gave the jurisdiction over the person of the defendant. * * * It was one of the designs of the Code to materially change the rules of pleading as they had previously existed, and for that purpose it provided for but one answer and authorized the defendant to set forth in it as many defenses or counter-claims, or both, as he should have (Code Civ. Pro., § 507). And as the matters alleged in the first subdivision of his answer were fully authorized by way of defense by the preceding sections, which have been referred to, this section permitted him to add to that defense as many others as he deemed himself to be entitled to insist upon. And in presenting them by way of answer he was in no manner, either expressly or by any implication, required to abandon

the effect of the facts relied upon to show that the Court had no jurisdiction over him. The rule of the preceding practice in this manner was changed, for it no longer restricted the defendant to a defense which might be presented by way of abatement, but allowed him, in conjunction with that defense, to present any others which might be regarded as appropriate defenses to the action. And such was considered the effect of the change in *Sweet* vs. *Tuttle* (4 Kernan, 465), where this point was presented and disposed of in this manner by the Court."

Hamburger *vs.* Baker, 35 Hun, 456.

And this is the settled rule in the State of New York.

Sweet *vs.* Tuttle, 14 N. Y., 465.
Gardner *vs.* Clark, 21 N. Y., 399.
Traver *vs.* Eighth Ave., 3 Keyes, 497.
Dawley *vs.* Brown, 9 Hun, 161.
Mayhew *vs.* Robinson, 10 How. Pr., 162.

So that when the defendant removed this cause into the United States Circuit Court, its right remained unimpaired to interpose its plea in abatement by way of answer that jurisdiction of the person had not been obtained over it by service upon one of its officers temporarily within this State, because it did no business there and had no legal existence there. But this question was not open in the Courts of the State of New York. By specific statutory enactment and the decisions of its highest courts the rights of the defendant under the Constitution and law of the United States were nullified and denied in the forum of the State Courts.

Sec. 432, Code of Civil Procedure (N. Y.)
Pope *vs.* Terre Haute C. and M. Co., 87 N. Y., 137.

And to have those rights recognized it was necessary that the defendant should avail itself of the method provided under the Constitution and law of the United States for the protection and preservation of those rights, by invoking the protection of the Courts of the United States, and withdrawing into their forum for decision, in accordance with the laws of the United States, all questions arising upon any and all defenses to be interposed by it in the controversy between it and the plaintiff, citizens of different States.

Says Mr. Chief-Justice Waite in Duncan *vs.* Gegan:

"The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State Court was deprived of its jurisdiction."

Duncan *vs.* Gegan, 101 U. S., p. 812.

But it has been seen (*supra*) that the condition of this case was, that at the time of its removal, the right of the defendant to raise the objection that jurisdiction of the person had not been obtained, remained unimpaired. It necessarily follows, therefore, that the Court below took the case with that right still unimpaired.

The contention therefore of the plaintiff in error that by filing the petition for removal the defendant submitted itself to the jurisdiction

of the State Court, and waived the right to object in the United States Court, that jurisdiction of the person had not been obtained, it is submitted, is erroneous.

The plaintiff in error relies for the support of this contention on the case of Farmer *vs.* N. L. Association, 138 N. Y., 265, and the cases there cited. In Farmer *vs.* N. L. Association, the cause had been removed to the United States Circuit Court, and remanded to the State Court, and thereafter, the defendant moved to set aside the service of the summons, and it was held that by filing its petition for removal it had submitted itself to the jurisdiction of the State Court, although the appearance was special and only for the purpose of presenting the petition for removal, but the reasons given for this decision there are admitted to be limited in their application to the State Court, and can have on this question no authority here.

Says the N. Y. Court of Appeals: "We are aware that there are many cases in the Federal Circuit Courts which hold that after removal the defendant may move to dismiss the action because of defective service of process in the State Court, and that his appearance there for the purpose of taking the necessary proceedings to remove the action is not a waiver of his right to make the motion, especially if he has not appeared generally in the State Court. But these decisions apparently rest upon the ground that by the provisions of the act of Congress, when the removal is effected the Federal Court is authorized to proceed with the action as if it had originally been brought in that Court, and that the defendant has a right to have every question which involves the authority of the plaintiff to implead him determined in the federal jurisdiction.

If this were not so, it is urged that it would be in the power of the State Court to confer jurisdiction of the person upon the Federal Court by an improper service of process, and the defendant would be precluded from obtaining the judgment of the Federal Court upon that question. It is thought that the integrity of the Federal jurisdiction requires the enforcement of such a rule of practice. But the reasons for the rule cease to exist when the question arises in the State Court, and it cannot there be observed consistently with a proper respect for its own authority.

Farmer *vs.* National Life Association, 138 N. Y., p. 270.

Two cases are cited in this opinion which are understood to be relied upon by the plaintiff in error: Sales *vs.* Northwestern Ins. Company, 2 Curtis C. C., 212; and Bushnell *vs.* Kennedy, 9 Wall, 387, 393. The first of these cases arose under the Act of 1789.

The facts in that case were not the same as in the case at bar—and in any view of the decision there made, it cannot be regarded as an authority in the case at bar, first, because it has been superseded by the later cases in the Circuit Court referred to below; and, secondly, because, since its decision, the doctrine of Pennoyer *vs.* Neff has been declared, which no longer permits the question of an attempt to drag a citizen of another State unlawfully into a foreign jurisdiction for purpose of suit and judgment, to be treated as a mere irregularity of service,

as is done in Sayler *vs.* N. W. Ins. Co., but as one involving a *fundamental right*.

In Bushnell *vs.* Kennedy, the question was whether under the 12th section of the Judiciary Act a case could be removed from the State to the Federal Court, of which that court would not have jurisdiction if originally commenced there.

The question in that case was not whether the State Court had rightfully acquired jurisdiction over the defendant. It was conceded that, before the removal, the State Court had complete jurisdiction over the defendant and the subject matter of the suit. The defendant being properly in the State Court removed the cause to the United States Court, and then moved to dismiss the case on the ground that the United States Court had no jurisdiction over the subject matter of the action, which was a suit by an assignee upon an assigned claim, on which the assignor could not have sued originally in the United States Court. The question presented here was not involved, and was not decided in that case.

It is therefore submitted that the authorities relied upon in support of the contention of the plaintiff in error are not applicable to the case at bar. That contention has been overruled in numerous cases in the Circuit Courts. Among others, in

Parrott *vs.* Alabama Gold Life Ins. Co., 5 Fed. Rep., 591.
Atchison *vs.* Morris, 11 Fed. Rep., 582.
Small *vs.* Montgomery, 17 Fed. Rep., 865.
Hendrickson *vs.* Chicago, R. I. & P. R. R. Co., 22 Fed. Rep., 569.
Kauffman *vs.* Kennedy, 25 Fed Rep., 785.
Miner *vs.* Markham, 28 Fed. Rep., 387.
Perkins *vs.* Hendryx, 40 Fed. Rep., 657.
Clews *vs.* Woodstock Iron Co., 44 Fed. Rep., 31.
Bentlif *vs.* London & Co's. Fin. Co., 44 Fed. Rep., 667.
Forrest *vs.* Union Pacific Co., 47 Fed. Rep., 1.
Reif-inder *vs.* Amer. Pub. Co., 45 Fed. Rep., 433.
O'Donnell *vs.* Atchison, etc., R. Co., 49 Fed. Rep., 689.
Hendrickson *vs.* Chicago, etc., R. R. Co., 22 Fed. Rep., 569.
Elgin Canning Co., *vs.* Atchison, etc., R. Co. (1885), 24 Fed. Rep., 866.
Farmer *vs.* National Life, 50 Fed. Rep., 829.

Says Judge Drummond in Atchison *vs.* Morris, 11 Fed. Rep., 582 (supra) on this point, where it was so contended:

"In fact, it may have been among other reasons, for the very purpose of objecting to the service of the summons the defendant requested that the cause should be removed to the Federal Court, because in a proper case a party has the right to the opinion of the Federal Court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process, and it would be contrary to the manifest intent of the Act of Congress to hold that a party who has a right to remove a cause is foreclosed as to any question which

the Federal Court can be called upon under the law to decide, and I have no doubt this is such a question."

Says Wallace, *J.*, in Bentlif *vs.* London and Colonial Finance Corp., Limited, 44 Federal Reporter, page 667:

"If the plaintiff could not have obtained a judgment in the State Court which would have any validity whatever when called in question here, because of want of jurisdiction, what reason is there for denying to the defendant the right to challenge the jurisdiction at the threshold of the controversy? An alien, or a citizen of another State, sued in a State court other than that of the State in which he resides, is entitled, by removing the suit, to have all questions involved in it heard and disposed of by the Federal Court. The sole object of the constitutional and statutory provisions, conferring jurisdiction upon Federal courts in behalf of aliens and citizens of other states is that they may seek a trial and decision in these courts of questions which they are unwilling to submit to the judgment of the State tribunals. There are expressions in the cases of Sayles *vs.* Insurance Co., 2 Curt., 212, and Bushnell *vs.* Kennedy, 9 Wall., 387, favorable to the contention for the plaintiff here, and to the effect that a party who has removed a suit from the State Court cannot dismiss it in the Federal Court upon the ground that the State Court did not have jurisdiction of the action. These expressions, however, were unnecessary to the decision of the cases, and since they were reported there have been numerous decisions of Circuit Courts to the contrary (Parrott *vs.* Insurance Co., 5 Fed. Rep., 391; Atchison *vs.* Morris, 11 Fed. Rep., 582; Small *vs.* Montgomery, 17 Fed. Rep., 865; Hendrickson *vs.* Railroad Co., 22 Fed. Rep., 569; Kauffmann *vs.* Kennedy, 25 Fed. Rep., 785; Miner *vs.* Markham,, 28 Fed. Rep., 387; Perkins *vs.* Hendryx, 40 Fed. Rep., 657; Golding *vs.* "Morning News," 42 Fed. Rep., 112).

"The last case was a decision of this Court by Judge Lacombe. The proposition thus decided ought not to be regarded in this Court as disputable. The motion by the defendant to set aside the service of process and dismiss the suit is granted. The motion made by the plaintiff to remand the suit to the State Court is without any foundation whatever and is denied."

Bentlif *vs.* London and Colonial Finance Co., 44 Fed. Rep., 667.

Says Lacombe, *J.*, in Clews *vs.* Woodstock Iron Co., 44 Federal Reporter, 32:

"It would be absurd to hold that proceedings in a State Court were void on the theory that such Court acquired no jurisdiction of the party because its attempted service of process was abhorrent to natural justice and international law, and at the same time to hold that a Federal Court could administer justice under such a service after the cause had been removed to its forum. Nor does removal and special appearance by the defendant waive its right to avail of a defective service (Harkness *vs.* Hyde, 98 U. S., 476; Miner *vs.* Markham, 28 Fed. Rep., 395)."

Clews *vs.* Woodstock Iron Co., 44 Fed. Rep., 32.

Says Colt, *J.*, in Perkins *vs.* Hendryx, 40 Fed. Reps., 657:

"The *second* question which arises is whether the act of the defendants in appearing in the State Court for the purpose of removing the case to this court constitutes a waiver of any irregularity as to service of process. This identical question has been several times before the Federal Courts for adjudication; and, so far as I have been able to examine the cases, it has uniformly been held that an appearance in the State court for the purpose of removal is not such a general appearance as to give the Federal Court jurisdiction."

Hendrickson *vs.* Railway, 22 Fed. Reps., 569.
Small *vs.* Montgomery, 17 Fed. Rep., 865.
Atchison *vs.* Morris, 11 Fed. Rep., 582.

But even if it were otherwise, and the filing of the petition could in any view of the case be looked upon as a general appearance, the defendant was careful to limit its appearance *for the sole and special purpose of presenting its said petition.*

See petition for removal herein.

A limited special appearance for the sole and single purpose of filing the petition ought not, it is submitted, to be twisted into a general appearance conferring jurisdiction.

Miner *vs.* Markham, 28 Fed. Rep., 387.

Nor can it be maintained that the defendant by appearing in the Court below in the manner in which it has so appeared, has waived the right to object to the jurisdiction of the Court below over the person of the defendant in this action.

This was directly so held in Decker *vs.* New York Belting Co., 11 Blatchford, 76 *supra*, where Judge Blatchford says: "The case of "The Commercial R. R. Bank of Vicksburg *vs.* Slocum, 14 Pet., 60, "64, is a decisive authority that a corporation does not waive an objec- "tion to the jurisdiction of the Court over it by appearing and by an "attorney objecting to the jurisdiction of the Court."

Much less then has the defendant waived the right to object to the jurisdiction of this Court by appearing specially and for the sole and single purpose of objecting to the jurisdiction of the Court.

That such an appearance does not waive the right to object to the jurisdiction has been directly held by the U. S. Supreme Court in Harkness *vs.* Hyde, 98 U. S., 479. Says that learned Court:

"The right of the defendant to insist upon the objection to the illeg- "ality of the service was not waived by the special appearance of coun- "sel for him to move the dismissal of the action on that ground or what "we consider as intended that the service be set aside."

Harkness *vs.* Hyde, 98 U. S., 476, 479.

The issue as to the sufficiency of the writ or its service may under the practice in the Court below be raised as a preliminary question on a motion to set aside the service of the summons:

Clews *vs.* Woodstock Iron Co., 44 Fed. Rep., 31.
Bentlif *vs.* London and Col. Tin Co., Ibid., 667.
Filli *vs.* Del., L. & W. R. R. Co., 37 Fed. Rep., 65.

That the question may also be raised under the State practice by way of plea in abatement joined with a plea in bar in the answer of the defendant has been shown.

Hamburger *vs.* Baker, 35 Hun, N. Y., 455.
Swift *vs.* Tuttle, 14 N. Y. 465.,
Gardner *vs.* Clark, 21 N. Y., 399, and cases cited (supra).

The defendant, however, has the privilege of raising the question by motion in the first instance *if he so desires.* Says Barret, *J.*, in Van Hesse *vs.* Mackaye: "As to the second point, the case of Bryan *vs.* University Pub. Co., 112 N. Y., 383, is conclusive. The Court there held that the defendant "is entitled to make the motion rather than submit to the hardships of coming into the State to defend the action."

Von Hesse *vs.* Mackaye, 29 State Rep., 234.
Bryan *vs.* University Pub. Co., 112 N. Y., 383.

It is therefore respectfully submitted that the contention that the defendant in error waived its right to have the question of personal jurisdiction passed on by the Court below by filing its petition for removal under a special appearance for that purpose was properly overruled.

It is submitted, to support that contention is to defeat the right of the defendant to have the exercise of the judicial power of the United States operate in reference to the foundation of the whole legal controversy between himself and a citizen of another State, who seeks to obtain a personal judgment against the defendant as the outcome of that controversy.

Says the Constitution, Article III., Section 2: "The judicial power of the United States shall extend to controversies between citizens of different States."

Not to a part of the controversy, *but to the whole of the legal controversy*, and especially it is submitted to the fundamental question as to whether the right of a citizen of the United States granted to it by the law had been violated in the attempted institution of unlawful proceedings against it.

The question is a serious one for the defendant in error. It finds itself threatened with a suit for $100,000 in a foreign forum for acts arising in the conduct of its business in the State of Connecticut.

It is attempted to hold it liable in that forum for alleged acts done in the State of Connecticut, where it alone has a legal existence, and where it has been careful to conform its acts in all matters in conformity with the law, and where it has continued to exist because of the protection which the law of that State accords it. The law of Connecticut provides that in such an action as this no damages can be obtained against the defendant unless special malice be proved.

Sec 1116, Revision 1888, General Statutes of Conn.

It is therefore most earnestly submitted that the defendant, being a citizen of a different State from that of the plaintiff, and the controversy involving more than two thousand dollars in value, has an absolute constitutional right to have the cause *in all its branches* tried, heard and determined in the United States Court administering the law of the Consti-

tution, and as declared by the Courts of the United States, and that its act in availing itself of the method established by law to secure such right ought not to be construed into a waiver of that right.

Point V.

THE ATTEMPTED SERVICE OF THE SUMMONS IN THE CASE AT BAR WAS ABSOLUTELY VOID.

The State law could give no validity to that service in the courts of the United States.

The United States courts sit to administer the law as declared by the Judicial power of the United States. Whatever rules of law may be operative in other forums, in the forum of the courts of the United States the law of the United States alone prevails if it has been declared upon a given question. There is no other law.

Says Chief Justice Marshal in Cohens *vs.* Virginia, 6 Wheaton, 413:

"America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

Cohens *vs.* Virginia, U. S. Sup. Ct., 6 Wheat., 413.
Martin *vs.* Hunter's Lessee, 1 Wheat., 304.
McCulloch *vs.* Maryland, 4 Wheat., 316.
Ableman *vs.* Booth, 21 How., 506.

Says Judge Story in Steamboat "Orleans" *vs.* "Phoebus," 11 Pet., 183:

"*The local laws can never confer jurisdiction on the courts of the United States.* They can only furnish the rules to ascertain the rights of parties and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States."

Says Blatchford, *J.*, in Baron *vs.* Burnside, 12 U. S., 198, approving Home Insurance Company *vs.* Morse, 20 Wall, 445:

"In regard to the second question, the proposition laid down was that the jurisdiction of the Federal Courts, under article 3, section 2 of the Constitution, depends upon and is regulated by the Laws of the United States; that *State Legislation* cannot confer jurisdiction upon the Federal Courts, nor limit nor restrict the authority given to them by Congress in pursuance of the Constitution; and that a corporation is

a citizen of the State by which it is created and in which its principal place of business is situated, so far as its right to sue and be sued in the Federal Courts is concerned, and within the clause of the Constitution extending the jurisdiction of the Federal Courts to controversies between citizens of different States."

Baron *vs.* Burnside, 121 U. S., 198.

In accordance with the provisions of the Removal Act, the defendant invoked the protection of the Court of the United States against an attempted violation under a law of the State of New York of its rights as a citizen of the State of Connecticut, secured to it by the laws of the United States. The order of the Court below was the judicial declaration of the law of the United States that the local law sought to be enforced against the defendant in error was, as to it, void and of no effect.

Point VI.

It is, therefore, respectfully submitted that the order of the Court below should be affirmed.

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